FILE COPY

Office Supreme Court, U.S.
FEB 5 1959
JAMES R. BROWNING, Clerk

In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1958

No. 684

EASTERN COAL CORPORATION,
Petitioner,

v.

MARGIE RELIFORD, Administratrix of the Estate of Henderson G. Reliford, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI

GEORGE RICHARDSON, JR.,
Law & Commerce Building,
Bluefield, West Virginia,
Counsel for Petitioner

J. PEYTON HOBSON, JR.,
First National Bank Building,
Pikeville, Kentucky,

ALBERT S. KEMPER, JR.
Bluefield, West Virginia

Of Counsel for Petitioner

INDEX

	Page
Reports	2
Jurisdiction	2
Questions Presented	3
Kentucky Statutes	4-5
Statement	5-9
Jurisdiction District Court	10
Argument	10-17
Election to work under Compensation Act	10-13
Grievance remedies under Union Contract	13-14
Necessity to exhaust administrative remedy	14-15
Posting notice of compliance with Union Contract immaterial	15-17
Conclusion	17-18
Appendix	20-67

TABLE OF CASES

Dalton Adding Machine Co. v. State Corporation Commission, 236 U. S. 699	15
Dick v. International Harvester Company, 310 S. W. 2d 514 (Ky.)	3, 9, 11, 14
Federal Power Commission v. Arkansas Power and Light Co., 330 U. S. 802	15
Greene v. Caldwell, 170 Ky. 571	10
King v. United Commercial Travelers, 333 U. S. 153	17
Myers v. Bethlehem Ship Building Corporation, 303 U. S. 41	15

Page

Reliford v. Eastern Coal Corporation, 149 F. Supp. 778 2

Textile Workers Union of America v. Liucoln Mills of Alabama, 353 U. S. 448 13

Tharp v. L. & N. Railroad Co., 307 Ky. 322 14

Transcontinental and Western Air, Inc. v Koppal, 345 U. S. 653 14

United States v. Jones, 336 U. S. 641 15

INDEX TO APPENDIX

Kentucky Statutes

KRS 342.005 (1948) 20

KRS 342.015 (1948) 21

KRS 342.390 (1948) 23

KRS 342.395 (1948) 24

KRS 342.395 (1953) 25

KRS 342.270 (1) 26

KRS 342.316 (2) 27

KRS 342.275 28

KRS 342.285 29

KRS 342.290 30

Opinions of Court of Appeals (Sixth Circuit) 32-59

Majority Opinion June 26, 1958 32-47

Dissenting Opinion 47-50

Memorandum of Majority on Petition for Rehearing 50-54

Dissenting Memorandum 54-59

Opinion of Court of Appeals of Kentucky, Dick v. International Harvester Co. 59

In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1958

No.

EASTERN COAL CORPORATION,
Petitioner,

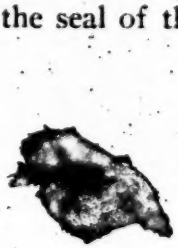
v.

MARGIE RELIFORD, Administratrix of the Estate of Henderson G. Reliford, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This petitioner, Eastern Coal Corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this court to review the decision



of the United States Court of Appeals for the Sixth Circuit rendered on June 26, 1958, in connection with which a petition for rehearing was denied on November 10, 1958, and which by a divided court reversed a judgment of the United States District Court for the Eastern District of Kentucky dismissing the respondent's complaint on the merits.

REPORTS

a. The District Court's opinion is reported as Reliford v. Eastern Coal Corporation, 149 F. Supp. 778. The opinion of the Court of Appeals rendered June 26, 1958, and the dissenting opinion as well as the further opinion of that Court and dissenting opinion rendered on November 10, 1958, upon the petition for rehearing, are reported in 260 F. 2d 447, December 29, 1958, Advance Sheet.

JURISDICTION

b. i. The judgment sought to be reviewed was entered and dated June 26, 1958. The petition for rehearing was denied and order entered accordingly on November 10, 1958.

ii. On July 16, appellee's time for filing petition for rehearing was extended to August 29, 1958. The petition for rehearing was filed August 20, 1958. The petition for rehearing was denied November 10, 1958.

iii. The jurisdiction of this court is invoked under U. S. C. Title 28, Section 1254.1.

QUESTIONS PRESENTED

c. i. May an appellee, on petition for rehearing to affirm a judgment below which was based primarily upon state law, properly take a position different from that taken on argument and presentation of the case when it appears that after argument and presentation of the case there was a decision by the state court of last resort changing an important rule of state law and making appellee's new position for the first time available to it?

ii. Is there any substantial breach by the employer of a Wage Agreement providing for Workmen's Compensation coverage as to occupational disease (silicosis) where to obtain such coverage the statute required joint action by employer and employee but the state court of last resort ruled just prior to the decision of this case that the execution of the Union Contract is as to the employer tantamount to its statutory election?

iii. Can the employee seek damages for failure to comply with the contract where he does not avail himself of the grievance remedies provided by the contract?

iv. In view of the ruling of the Court of Appeals of Kentucky in Dick v. International Harvester Company, 310 S. W. 2d 514, that the employer had, in effect, elected, can the employee maintain an action in the courts without having first exhausted the administrative remedy before the Workmen's Compensation Board and the appeals allowed from the rulings of that Board?

v. Could the respondent on appeal rely upon an alleged failure to perform the contract where as plaintiff in the

trial court he neither alleged such failure nor alleged or proved any detriment from such failure?

KENTUCKY STATUTES

d. Chapter 342 of the 1948 Edition of Kentucky Revised Statutes, page 2375, contains the Workmen's Compensation Act as same was in force during the period of the decedent's employment herein involved.

KRS 342.015, page 2377, provides that where an employer and employee have both elected to act under the Compensation Act the employee shall be entitled to its benefits but no more.

KRS 342.390, page 2398, shows how the election is to be made generally by the employer.

KRS 342.395, page 2399, until June 19, 1952, and KRS 342.400 fixed the method of election by the employee and gave directions for the preservation of the papers.

KRS 342.395 as amended in 1952, effective June 19, 1952. did away with the necessity for actual election by the employee and required notice of non-election if that were his choice. (1953 Statutes, page 2645).

KRS 342.005, page 2377, defined the nature of the business and the nature of the accident to which the act applies. Occupational diseases generally were excluded and as to silicosis this statute required that in order to obtain silicosis coverage under Workmen's Compensation the employer and the employee were to submit a joint voluntary application in writing to the board.

KRS 342.270 (1), page 2392, requires that application for adjustment of claims shall be filed within one year after the accident or within one year after cessation of voluntary payments.

KRS 342.316 (2), page 2394, requires that the claim for silicosis must be made within three years from the last injurious exposure.

KRS 342.270, page 2392, provides for application to the Board for adjustments.

KRS 342.275, page 2392, requires the Board to make its award.

KRS 342.285, page 2392, gives either party the right to appeal to the Circuit Court.

KRS 342.290, page 2393, provides for appeals to the Court of Appeals of Kentucky.

Each section of the statute is set out verbatim in the appendix hereto.

STATEMENT OF THE CASE

e. This case turns primarily upon the law of Kentucky but involves substantial federal questions. The action is based upon a wage agreement national in scope and has more than local importance. In it the Court of Appeals, it is submitted, has decided an important State question in a way in conflict with applicable State law, and has decided both procedural and substantive federal questions in a way in conflict with applicable decisions of this Court.

The petitioner operates coal mines in Pike County, Kentucky. The bargaining agent of its employees is the United Mine Workers of America. The contract between the Union and the operators provided, among other things:

> "Each operator who is a party to this agreement will provide the protection and coverage of the benefits under Workmen's Compensation and occupational disease laws, whether compulsory or elective, existing in the States in which the respective employees are employed. Refusal of any operator to carry out this directive shall be deemed a violation of this agreement. Notice of compliance with this section shall be posted at the mine."

It so happens that this requirement as to occupational disease was overlooked by both the mine workers and the operators. Everybody had complied as to compensation generally. (55a, 61a). Nothing was done by the operator, the union, or the individual miner to comply with the statutory requirements as to coverage for occupational disease (silicosis). KRS 342.005 (1948) 1c. Rearranging that statute but without any change in the words, we have this simplification of its requirements:

> Any employers and employees may, with respect to the disease of silicosis caused by the inhalation of silica dust, subject themselves, as to such disease, to the provisions of this chapter by joint, voluntary application to the Board in writing for such period as may be stated in the application which shall be irrevocable during such period and effective thereafter until a written revocation be filed with the Board or the employment be terminated.

Reliford left the employment June 28, 1951 (23a, 33a). A few months later he was advised by physicians that he had silicosis.

He got in touch with Mr. E. H. Gibbs, the Union representative who was to negotiate with Eastern for benefits. He was examined a number of times by different physicians, most of them at the instance of the Union and by one at the instance of Eastern and with conflicting reports. On October 23, 1952, Eastern's representative wrote E. H. Gibbs, Reliford's representative, that he could not pay the claim. (51a) The claim was not prosecuted in any way thereafter until Mr. Gibbs wrote Eastern again on March 2, 1955, in which he refers to an offer of settlement made in March, 1952, "on a 25% disability to the body as a whole." (44a)

Reliford got in touch with counsel at Pikeville, Kentucky, who made inquiry of the Secretary of the Workmen's Compensation Board as to the silicosis coverage of Eastern. By letter dated March 1, 1952, (61a) Eastern had informed the Workmen's Compensation Board of its desire voluntarily to subject itself to provisions of the Workmen's Compensation law with respect to the disease of silicosis, but that law as then construed made that coverage available only upon the joint voluntary application of the employer and the employee, and since there had been no such joint application the Secretary advised counsel for respondent that there was no such coverage for silicosis.

Early in March, 1956, (30a) Reliford filed this action against Eastern claiming failure on the part of Eastern to provide him with compensation coverage for silicosis

and that by reason thereof he had been unable to present his claim to the Workmen's Compensation Board of Kentucky and accordingly wanted to recover as much as the Board would have allowed him.

By its motion to dismiss Eastern raised the failure of the plaintiff to exhaust his administrative remedy by application to the Workmen's Compensation Board, (13a). By the third defense in its answer Eastern raised the necessity for an election by Reliford, (15a). By the fourth defense Eastern relied on plaintiff's failure to avail himself of the grievance machinery provided in the Union contract, (18a).

The district court after hearing dismissed the complaint on these grounds (77a, 89a, 149 F. Supp. 778):

(a) He had not availed himself of his administrative remedy before the Workmen's Compensation Board, (82a-85a).

(b) Reliford was barred because the statute required joint and simultaneous acceptance of the silicosis provisions and Reliford had done nothing to join, (85a-89a).

Shortly after the entry of the judgment on March 26, 1957, Reliford died—the record is silent as to the cause of his death—and on April 23rd his action was revived in the name of his widow as administratrix and the appeal was prosecuted in the Court of Appeals for the Sixth Circuit.

The Court of Appeals by a divided court reversed the District Court. After the appeal had been argued in the

Court of Appeals on February 3, 1958, the opinion of the Court of Appeals of Kentucky in *Dick* v. *International Harvester Company*, 310 S. W. 2d 514, 37c, was published in the advance sheets. That opinion held that the mine owner by the execution of this contract had in effect elected to give the silicosis coverage. This opinion was brought to the attention of the Court of Appeals in brief memorandums by both parties, first submitted by the appellant. After the opinion of June 26th Eastern filed a petition for rehearing insisting that under that opinion and the Dick case both Eastern and Reliford had for all practical purposes accepted the silicosis coverage and further insisting that it was incumbent on Reliford to exhaust his administrative remedy before the Board as a condition to the commencement of this action. Because the decision in the Dick case changed the Kentucky law as to the manner in which Workmen's Compensation coverage for silicosis might be obtained petitioner had to abandon the no longer tenable position it had taken in the trial court and when this case was argued and submitted on appeal, and in its petition for rehearing argued the rule adopted in the Dick case as the controlling state law. The majority of the Court of Appeals held that petitioner could not be permitted so to change its position.

The petition for rehearing was denied by a divided court. There was a majority memorandum (50) and a dissenting opinion (54). We think the majority opinion was in error in the expression that the argument of the appellee on petition for rehearing based upon the new announcement of the Kentucky Court ought not to be considered.

JURISDICTION

f. This action was commenced in the United States District Court for the Eastern District of Kentucky by H. G. Reliford, a citizen of Kentucky, against Eastern Coal Corporation, a West Virginia corporation, in which the plaintiff sought to recover an amount in excess of $3,000.00 exclusive of interest and costs. His claim was for $19,000.00. The jurisdiction of the District Court was based on USC Title 28, Section 1332.

ARGUMENT

g. The sections of the statute dealing with the election of employer and employee to operate under the compensation act are set out in the appendix (20 to 31). Because of some unusual provisions in the Constitution of Kentucky the validity of the compensation act was in great doubt. The freedom of the employee to accept or reject its benefits instead of his common law rights was given very serious attention by the Court of Appeals before the act was sustained, *Greene* v. *Caldwell*, 170 Ky. 571. The respondent accepted the traumatic provisions of the act (not silicosis) by signing a compensation register, and this was required until a new generation did away with it by the act of 1952. (1953 KRS 342.395)

i. *The election to work under the Act.* Under the act what is required to give the mine owner and the employee the protection of the Kentucky Workmen's Compensation Act is a matter of Kentucky law. The Kentucky law is based on the Kentucky Statutes as construed by the Court of Appeals of Kentucky.

The Union Contract required the employer to give this protection. The statute which required the joint application of the parties must necessarily be read into the contract and become a part of it. Prior to the decision in *Dick* v. *International Harvester Company,* 310 S. W. 2d 514, (Ap 59), the recognized law of Kentucky required joint affirmative action by the employer and the employee to obtain the benefits of the Workmen's Compensation Act in respect to silicosis. Memorandum opinion of the District Court, 77a, 87a. It was failure on the part of the employer to go forward with such action that the Court of Appeals held to be an actionable breach of the contract. June 26, 1958, opinion, 6b-7b. In *Dick* v. *International Harvester Company,* 310 S. W. 2d 514, the Kentucky Court held that under this provision of the Union contract the mine owner had in effect elected to give the compensation coverage for silicosis; that the employee had the right to reply upon the commitment in the contract as an election on the part of the mine owner to give the coverage.

Accordingly, there was no breach of the contract by the employer. It was as effectively covered for silicosis as if it had formally executed every paper required by the rules of the Board. In the Dick case the Court of Appeals went on to say, "In making it (the Union contract) the Union was the authorized agent and representative of its members and all parties are bound by it." The court had said that the employer was bound. Mutuality of obligation is the bed rock of contract law. If this contract is an election by the employer it is, also, an election by the employee.

If perchance Reliford did not elect by virtue of the contract, Eastern certainly had. If anything further remained

to be done it had to be done by Reliford and he, acting alone, could have made his own election.

The two opinions of the Court of Appeals of the Sixth Circuit indicate that that court felt that Reliford had the right to make the election after his retirement in 1951. If the Court of Appeals was correct in this, then Reliford could have made his election at any time and could then have sustained his claim before the Board.

The company had elected. Reliford had the right to elect, so that there was no breach in practical effect and nothing to prevent Reliford from prosecuting his claim before the Board.

We submit that the decision of the United States Court of Appeals is in conflict with the Kentucky law on this important Kentucky question.

When the Kentucky Court of Appeals decided the Dick case so as to change the rule of law controlling the manner in which Workmen's Compensation coverage for silicosis might be had, petitioner attempted to apply the rule as newly stated to the facts and issues in this case and in its petition for rehearing urged that upon the Court of Appeals. The Court's interdiction of that shift in position (majority memorandum on petition for rehearing, 50) it is submitted, conflicts with applicable decisions of this court. *United States* v. *American R. Exp. Co.*, 265 U. S. 425, Justice Brandeis: "* * By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined."

See also *Letulle* v. *Schofield*, 308 U. S. 415: "A respondent or an appellee may urge any matter appearing in the record in support of a judgment," and *Jaffke* v. *Dunham*, 352 U. S. 280: "A successful party in the District Court may sustain its judgment on any ground that finds support in the record."

Cold Metal Process Co. v. *McLouth Steel Corp.*, 6 Cir., 126 F. 2d 185, 189: "Appellee may urge or the appellate court *sua sponte* may consider any theory, argument or reason in support of a decision of a lower tribunal regardless of whether or not it applied that theory."

ii. *Grievance remedies under Union Contract.* The contract sets out how grievances arising under the contract are to be adjusted. (18a and 19a). After setting out three steps for negotiation, step four is by hearing before a Board composed of four members, two from the mine workers and two from the operators.

Step five provides that where they fail to agree the matter in dispute is submitted to an umpire, to be agreed upon by the parties affected. Had there been a refusal by Eastern to grant this coverage the respondent through the Union could have submitted the matter to a Board for hearing and then to an umpire. If Eastern had refused to participate in such arbitration proceedings the Union could have compelled it to participate. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448. The failure on the part of Reliford and his union to take advantage of these grievance steps is, we submit, a legal bar to the maintainance of the present action. The Kentucky

rule is that such steps must be followed before suit can be commenced. *Tharp* v. *L. & N. Railroad Co.*, 307 Ky. 322, 325.

Where the state law requires the use of the grievance machinery, an action can not be maintained in the Federal Courts under such a contract, touching commerce, in the absence of the exhaustion of the grievance proceedings. *Transcontinental and Western Air, Inc.* v. *Koppal*, 345 U. S. 653.

We submit that this federal question has in effect been decided in a way in conflict with the applicable decisions of this court.

iii. *Exhausting Administrative Remedy.* The statute KRS 342.270 gives every injured employee the right to make an application to the Board for an adjustment of his claim. 342.275 requires the Board to make an award after hearing. 342.285 gives either party the right of appeal to the Circuit Court and 342.290 gives an appeal to the Court of Appeals. This course was pursued by Dick in *Dick* v. *International Harvester Company*, 310 S. W. 2d 514. The coal mine employee there, suffering from silicosis, sustained his claim in the Court of Appeals.

This administrative remedy was open to Reliford. He failed to file an application for adjustment of his claim. His attorney wrote the Secretary of the Board and got an adverse reply. But writing a letter to the Secretary of the Board is not exhausting the administrative remedy.

He could make formal application to the Board and

prove the union contract, the agreement by the mine operator to give compensation coverage for silicosis. If unsuccessful there he could appeal to Circuit Court, a court of general jurisdiction, and then to the Court of Appeals of Kentucky where he has an appeal as a matter of right. He took none of these steps.

It was necessary for him to exhaust the administrative remedy before commencing his action.

Myers v. *Bethlehem Ship Building Corporation*, 303 U. S. 41,

United States v. *Jones*, 336 U. S. 641,

Federal Power Commission v. *Arkansas Power & Light Company*, 330 U. S. 802,

Dalton Adding Machine Co. v. *State Corporation Commission*, 236 U. S. 699.

We submit that the decision of the Court of Appeals is in conflict with the applicable decisions of this court.

iv. *Posting Notice Immaterial.* The contract does require that a notice of compliance with the Workmen's Compensation section of the agreement be posted. The contract says, "Notice of compliance with this section shall be posted at the mine." (78a) The only time, however, that this last sentence of the paragraph appears in the printed record in this case is where the District Court quoted the whole paragraph in his memorandum. (78a) In plaintiff's complaint (10a) the paragraph is quoted down to this point

but the sentence about posting notice is omitted. There is no allegation in the complaint about any posting of a notice of compliance or any failure to post such a notice. The only testimony on the subject is on page 46a and it is entirely inconclusive and does not even show that such a notice was not posted. There is no claim in the plaintiff's complaint that such notice was not posted. There is no claim in the complaint and there is no claim in the evidence that Reliford was prejudiced in any manner by failure to post the notice. The correspondence between Eastern and Gibbs of the Mine Workers in connection with a possible adjustment is apparently all based on the assumption that Reliford's claim of silicosis was covered under the Workmen's Compensation Act. Gibbs writes Eastern in this language: "Possible settlement in this case on a 25% disability to the body as a whole." (44a) These are terms used in Workmen's compensation matters. When people settle compensation cases they settle them on the basis of disability. When they settle personal injury claims they settle on the basis of dollars and cents. It is clear from the record that these negotiations in March, 1952 were based on the assumption that Eastern was carrying compensation for silicosis. If Reliford and his adviser, Gibbs, understood that Eastern was carrying compensation, Reliford has sustained no prejudice by reason of Eastern's failure to post such a notice.

In the trial court and on appeal the respondent's case rested upon the claim that petitioner breached the contract by failing to provide Workmen's Compensation coverage for silicosis. Down to the decision of this case by the Court of Appeals no breach of the contract had been claimed and no right had been asserted by reason of the employer's

failure to post notice of compliance. Yet, according to the final majority opinion of the Court of Appeals, liability for breach of the contract is based upon this failure to post the notice.

We submit that the majority opinion in connection with posting the notice is based on a misunderstanding of the record.

CONCLUSION

This petition is submitted because we feel that the court below has failed to follow what appears to be the reasonably plain ruling of the Court of Appeals of Kentucky in the case of *Dick* v. *International Harvester Company*. It is interesting to note that this case was considered by four judges, two circuit judges and two district judges. One of the district judges is a Kentucky lawyer. One of the circuit judges is a Kentucky lawyer. Both of these Kentucky lawyers were in agreement that under the Kentucky law the plaintiff had no case. The circuit judge and the district judge who took the opposite view, while having long and splendid experience as judges, have not had similar experience with the Kentucky law. In ordinary cases this court accepts the judgment of the local circuit on the state law and in a good many of the circuits the Court of Appeals accepts the judgment of the district court on the state law.

The opinions of this court in *King* v. *United Commercial Travelers*, 333 U. S. 153, and in other cases show very clearly that this court is always ready to consider decisions on state law which are announced pending the appeal. It

is submitted that on the petition for rehearing the court below did not give to the Kentucky court's opinion in the Dick case the weight it ought to have had.

We respectfully request that the judgment of the Court of Appeals be reversed and that the judgment of the District Court be affirmed.

Respectfully submitted,

GEORGE RICHARDSON, JR.,
Bluefield, West Virginia,
Counsel for Petitioner.

J. PEYTON HOBSON, JR.,
Pikeville, Kentucky,

ALBERT S. KEMPER, JR.
Bluefield, West Virginia
Of Counsel for Petitioner.

KRS 342.005, Page 2377

342.005 (4880) Employers and employes to whom chapter applies; liability covered by chapter; voluntary election to come under chapter.

(1) This chapter shall apply to all employers having three or more employes regularly engaged in the same occupation or business, and to their employes, except that it shall not apply to domestic employment, agriculture, steam railways, or such common carriers other than steam railways for which a rule of liability is provided by the laws of the United States; provided, however, it shall apply to the operators of threshing machines used in threshing or hulling grain or seeds. It shall affect the liability of the employers subject thereto to their employes for a personal injury sustained by the employe by accident arising out of and in the course of his employment, or for death resulting from such accidental injury; provided, however, that "personal injury by accident" as herein defined shall not include diseases except where the disease is the natural and direct result of a traumatic injury by accident, nor shall it include the results of a pre-existing disease, whether previously disabling or not, but shall include injury or death due to inhalation in mines of noxious gases or smoke, commonly known as "bad air," and also shall include injuries or death due to the inhalation of any kind of gas.

(2) Any employers and employes who are by the provisions of this section excepted from the provisions of this chapter, including employers having less than three employes, may subject themselves thereto by joint, voluntary application to the board, in writing, for such period as may be stated in the application, which shall be irrev-

ocable during such period and effective thereafter until a written revocation be filed with the board or the employment be terminated, and any employers and their employes may, with respect to the disease of silicosis caused by the inhalation of silica dust, in like manner voluntarily subject themselves thereto as to such disease. (1944, c. 82, § 1; 1946, c. 203, § 1; 1948, c. 64 § 1, effective June 30, 1948).

KRS 342.015, Page 2378

342.015 (4882) Acceptance of chapter relieves of other liability; exceptions; willful misconduct.

(1) Where, at the time of the injury both employer and employe have elected to furnish or accept compensation under the provisions of this chapter for a personal injury, received by an employe by accident and arising out of and in the course of his employment, or for death resulting from such injury, within two years thereafter, the employer shall be liable to provide and pay compensation under the provisions of this chapter and shall, except as provided in sub-section (2) of this section and in KRS 342.170, be released from all other liability.

(2) If injury or death results to an employe through the deliberate intention of his employer to produce such injury or death, the employe or his dependent as herein defined shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit against the employer for any amount they desire. If injury or death re-

sults to an employe through the deliberate intention of his employer to produce such injury or death, the employe or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed, for such damage so sustained by the employe, his dependents or personal representatives as is recoverable at law. If a suit is brought under this section, all right to compensation under this chapter shall thereby be waived as to all persons. If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons.

(3) No employe or dependent of any employe may receive compensation on account of any injury to or death of an employe caused by a willful, self-inflicted injury, willful misconduct or intoxication of such employe.

(4) "Willful misconduct" as used in this section, when relating to the disease of silicosis caused by the inhalation of silica dust, shall include:

(a) Failure or omission on the part of an employe to observe rules and recommendations adopted by the employer and approved by the Workmen's Compensation Board and kept posted in a conspicuous place in and about the plant;

(b) Failure or omission on the part of an employe truthfully to state to the best of his knowledge in answer to inquiry made by the employer the place, duration, and nature of previous employment;

(c) Failure and omission on the part of an employe

truthfully to furnish to the best of his knowledge in answer to an inquiry made by the employer full information about the previous status of his health, habits, and medical attention that he or his blood relatives may have received;

(d) Failure to submit to medical examination to determine his physical condition with reference to the disease of silicosis when ordered by the board, or evasion or obstruction of such examination.

KRS 342.390, Page 2398

342.390 (4956) Employer's notice of election to operate under this chapter; evidence of election.

(1) Election to operate under this chapter shall be effected by the employer by filing with the board the following notice:

"(Name of employer) elects to operate under the Workmen's Compensation Law (KRS Chapter 342). This election is effective as of the day of . . . and covering (here insert name of industry, business or operation on which election is made.)"

(2) In addition to the name of each industry, business or operation as to which such election is filed there shall also be stated in the notice with reference thereto:

(a) Its location and address of chief office;

(b) Average number of employes during preceding twelve months;

(c) Kind of business being conducted; and

(d) Method of securing payments of compensation to employes that the employer elects to adopt.

(3) The notice shall be in writing signed by the employer, if an individual, by any partner, if a partnership; or by the chief officer or agent within this state, if a corporation.

(4) The notice or a copy thereof certified by an authorized representative of the board may be used as evidence in any action by or against the employer in any court of this state of the facts therein shown and that the employer has elected to operate under this chapter.

KRS 342.395, Page 2399

342.395 (4957) Employe's notice of election to operate under this chapter; duration; evidence of election.

(1) Election to operate under this chapter shall be effected by the employe by signing the following notice:

"I hereby agree with (name of employer) to accept the provisions of the Kentucky Workmen's Compensation Law (KRS Chapter 342)."

(2) The election shall be effective from and including the date of signing, which shall be inserted opposite the employe's signature. In case an employe is unable to write, his mark shall be witnessed by a third person, who shall at the time read the notice to the employe. Any number

of employes may sign the same notice, if there is conspicuously written or printed at the top of each page thereof on which signatures appear a copy of the above form of notice. If the employment at any time is suspended the original acceptance of the employe shall continue effective in subsequent employment under the same employer, unless withdrawn in the manner provided under KRS 342.405. Identification of the employe's signature or mark shall constitute conclusive proof of his election to operate under this chapter in any hearing or proceeding in which such election may be material or in issue.

(3) Whenever, in the hearing of a claim for compensation on account of the death of an employe, it has been shown that at the time of the accident alleged to have resulted in his death, the employer had accepted and was operating under this chapter and that employe sustained the accident in the course of his employment, this evidence shall constitute prima facie proof that the deceased had himself duly accepted the provisions of this chapter. (1948, c. 64, § 15; effective June 30, 1948)

KRS 342.395, Page 2645

342.395 (4957) Employe deemed to have accepted provisions of chapter unless contrary notice given employer: withdrawal of election to reject chapter.

In the event an employer elects to operate under this chapter, then every employe of such employer, as a part of his contract of hiring or who may be employed at the time of the acceptance of the provisions of this chapter

by such employer, shall be deemed to have accepted all the provisions of this chapter and shall be bound thereby unless he shall have filed, prior to the injury, a written notice to the contrary with the employer. Until such notice to the contrary is so given to the employer, the measure of liability of such employer shall be determined according to the compensation provisions of this chapter. Any such employe may, without prejudice to any existing right or claim, withdraw his election to reject this chapter by filing with the employer a written notice of withdrawal, stating the date when the withdrawal is to become effective. Following the filing of such notice, the status of the party withdrawing shall become the same as if the former election to reject this chapter had not been made, except that withdrawal shall not be effective as to any injury sustained less than one week after the notice is filed. (1948, c. 64, § 15; 1952, c. 82; effective June 19, 1952)

KRS 342.270, Page 2392

342.270 (4932) Board hearing; application for; time and place of; notice; informal conference with parties.

(1) If the parties fail to reach an agreement in regard to compensation under this chapter, or if they have previously filed such an agreement with the board and compensation has been paid or is due in accordance therewith and the parties thereafter disagree, either party may make written application to the board for a hearing in regard to the matter at issue and for a ruling thereon. Such application must be filed within one year after the accident, or, in case of death, within one year after such death, or within

one year after the cessation of voluntary payments, if any have been made.

(2) As soon as possible after the application has been received the board shall set the date for a hearing, to be held as soon as is practicable in view of the matter involved, and shall notify the parties at issue of the time and place of such hearing.

(3) Unless otherwise agreed to by the parties and authorized by the board, the hearing shall be held at or convenient to the place where the injury was sustained or the ground for disagreement occurred. Before directing a hearing, the board, or a member thereof or referee authorized by the board, may confer informally with the parties at issue in an attempt to assist in adjusting their differences, but may not delay the granting of a hearing, over the objection of either party, for such purpose. (1948, c. 64, § 14; effective June 30, 1948)

KRS 342.316 (2), Page 2394

342.316 Silicosis; claim and allowance of compensation for.

(2) Unless notice of disability or death due to silicosis is given to the employer as soon as practicable after the employe has knowledge that he has contracted such disease and claim is made upon the employer within three years from the last injurious exposure to silica dust, all right to compensation for disability or death from silicosis shall be forever barred; provided, however, that notice of such

claim shall be deemed waived in case of disability or death where the employer, or his insurance carrier, voluntarily makes payments therefor, or, if the incurrence of the disease or the death of the employe, and its cause was known to the employer, and, provided further, that where compensation has been paid or awarded and payments have been discontinued, whether for disability or death from silicosis, the claim for further compensation must be made within one year after the last payment for compensation.

KRS 342.275, Page 2392

342.275 (4933) Board hearing; when award to be made; record filed; copy of award sent to parties.

The board, or any of its members, shall hear the parties at issue and their representatives and witnesses and shall determine the dispute in a summary manner. The award shall be made within thirty days after final submission, except in cases involving large or complicated records or unusual questions of law, and shall be made within ninety days after final submission in any event. The award, together with a statement of the findings of fact, rulings of law and any other matters pertinent to the question at issue shall be filed with the record of proceedings, and a copy of the award shall immediately be sent to the parties in dispute.

KRS 342.285, Page 2392

342.285 (4935) Appeal to circuit court.

(1) An award or order of the board as provided in KRS 342.275, if application for review is not filed as provided for in KRS 342.280, shall be conclusive and binding as to all questions of fact, but either party may, within twenty days after the rendition of such final award or order of the board, by petition appeal to the circuit court that would have jurisdiction to try an action for damages for the injuries if this chapter did not exist, for the review of such order or award, the board and the adverse party being made respondents.

(2) The petition shall state fully the grounds upon which a review is sought, assign all errors relied on and be verified by the petitioner, who shall furnish copies of the petition to the respondents at the time of filing it. Summons shall issue upon the petition directing the adverse party to file answer within fifteen days after service thereof and directing the board to send its entire original record, properly bound, to the clerk of the circuit court, after certifying that such record is its entire original record, which shall be filed by the clerk of the circuit court and such record shall then become and be considered by the circuit court on the review.

(3) No new or additional evidence may be introduced in the circuit court except as to the fraud or misconduct of some person engaged in the administration of this chapter and affecting the order, ruling or award, but the court shall otherwise hear the cause upon the record as certified by the board and shall dispose of the cause in

summary manner, its review being limited to determining whether or not:

(a) The board acted without or in excess of its powers;

(b) The order, decision or award was procured by fraud;

(c) The order, decision or award is not in conformity to the provisions of this chapter; and

(d) If findings of fact are in issue, whether such findings of fact support the order, decision or award.

(4) The board and each party may appear in such review proceedings; the court shall enter judgment affirming, modifying or setting aside the order, decision or award, or in its discretion remanding the cause to the board for further proceedings in conformity with the direction of the court. The court may, before judgment and upon a sufficient showing of fact, remand the cause to the board. (1948, c. 152, § 1; effective March 13, 1948)

KRS 342.290, Page 2393

342.290 (4936) Appeal to Court of Appeals.

(1) Where an amount sufficient under KRS 21.060 to authorize an appeal to the Court of Appeals is involved, the judgment of the circuit court shall be subject to appeal to the Court of Appeals. The scope of review by the Court of Appeals shall include all matters subject to review by the circuit court and also errors of law arising in the circuit

court and upon appeal made reviewable by the Civil Code of procedure where not in conflict with this chapter.

(2) The procedure as to appeal to the Court of Appeals shall be the same as in civil actions, so far as it is applicable to and not in conflict with this chapter, except as follows:

(a) The appellant shall file with the clerk of the circuit court, together with proof or acknowledgment of service, a schedule which indicates the portions of the record to be incorporated into the transcript of the record to be used on appeal to the Court of Appeals. Should the appellee or his counsel desire additional portions of the record incorporated into the record to be filed in the Court of Appeals, he may file with the clerk of the circuit court his schedule also within ten days thereafter (unless the time is extended by order of the circuit court or the Court of Appeals), indicating the additional portions of the record desired by him. Provided, however, that if the original record of the Workmen's Compensation Board is desired by either party on appeal to the Court of Appeals, it shall not be necessary for the clerk of the circuit court to copy said original record into the transcript, but the same shall be and become a part of the transcript and shall be forwarded to the Clerk of the Court of Appeals as a part of the record upon appeal to said court. The clerk shall not be entitled to any transcript fee for such original record.

(3) The clerk of the circuit court will transmit to the Court of Appeals as the transcript of the record only those portions of the record of the lower court as are designated by the parties as above. (1948, c. 152, § 2; effective March 13, 1948)

[Caption Omitted]

MAJORITY OPINION

Decided June 26, 1958.

Before ALLEN and MILLER, Circuit Judges, MATHES, District Judge.

ALLEN, Circuit Judge. This appeal attacks a judgment of the District Court entered in an action based upon a contract executed July 5, 1941, by the United Mine Workers, hereinafter called UMW, and defendant[1] Eastern Coal Corporation, hereinafter called Eastern, which covered the rights of all miners employed by defendant. Plaintiff's decedent, hereinafter called Reliford, worked in Eastern's coal mine at Stone, Pike County, Kentucky, from July 7, 1936, until June 28, 1951. During the entire time, as required by the contract between UMW and Eastern, Reliford was a member of UMW and that union was his bargaining agent. He filled various mine occupations, such as motorman, boom man, and for a number of years was "shooting" coal. On June 28, 1951, Reliford retired because he was advised by several doctors that he had contracted silicosis.

The contract, executed July 5, 1941, between The Operators Association of The Williamson Field, of which

[1] The parties will be denominated as in the court below.

Eastern was a member, and the local and international unions UMW, covered the general field of problems between labor and management in the coal industry. While it was denominated "Wage Agreement," it contained detailed provisions not only for wages but also for numerous subjects, such as management of mines, preparation of coal, safety practices, duties of engineers and pumpers, seniority, holidays, and adjustment of house rents. It contained a no-strike provision under which the miners were individually obligated to assist in preventing local strikes.

The particular provision involved herein required the employer to provide its employees with the benefits of the Kentucky Workmen's Compensation Act. In 1941 in Kentucky these benefits did not cover occupational diseases. However, in 1944 the Workmen's Compensation Act was amended to provide that in silicosis cases employers and employees could voluntarily subject themselves to the Act by filing a joint voluntary application with the Workmen's Compensation Board, KRS 342.005 (2). On July 1, 1947, the wage agreement of Eastern and the unions was amended to conform to the change in the statute and the provision obligating employers to provide the benefits of the Act to employees was changed to read as follows:

"WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASES"

"Each Operator who is a party to this Agreement will provide the protection and coverage of the benefits under Workmen's Compensation and Occupational Disease Laws, whether compulsory or elective, existing in the states in which the respective employees

are employed. Refusal of any Operator to carry out this direction shall be deemed a violation of this Agreement. Notice of compliance with this section shall be posted at the mine."

The situation that resulted for employees was that if they registered under the Workmen's Compensation Act they were automatically protected as to accidental injuries or death. As to disability or death resulting from silicosis, however, the filing of the joint voluntary application by both employer and employee was an indispensable prerequisite to securing the benefits of the Act. KRS 342.005. In a silicosis case, absent the election by either the employer or the employee to operate under the Act, the Workmen's Compensation Board had no jurisdiction. The fact that the application was voluntary left the claimant who asserted that he was suffering from an occupational disease free, either to sue at common law subject to the usual defenses of contributory negligence, the fellow-servant rule, and assumption of risk, or to proceed under the Workmen's Compensation Act.

In adoption of this contract each party, if both elected to comply with the amended Act, obtained a substantial advantage as to claims arising from silicosis. The employer would not be subject to the possible burden of a large recovery. It would be relieved of further liability. KRS 342.015 (1). The employee would have the advantage of a swifter and less technical remedy than that given by litigation at common law, although he would also have the possibility of a smaller recovery. There thus was a mutual advantage and consideration for the employer's agreement to provide the benefits of the Workmen's Compensation Act as to silicosis for all employees.

The contract covering silicosis was executed July 1, 1947. At no time prior to March 1, 1952, did Eastern elect to operate under the amended statute nor did it post any notice that it had so elected. On that date it addressed a letter to the Workmen's Compensation Board of Kentucky in which it stated that it voluntarily subjected itself to the provisions of KRS 342.316. Possibly this letter, so long delayed, substantially complied with the statute (see KRS 342.390) but it did not comply with the contract. Notice of the employer's letter was not posted at the mine nor served upon Reliford or the UMW agent who was urging Reliford's claim with Eastern's claim agent.

It is contended that Reliford did not give notice of his disability within the time limitations of various provisions of the applicable statute KRS 342.005 (2). The District Court so held. KRS 342.005 (2), under familiar rules, is read into and becomes a part of the contract. However, in certain respects we think the statute has been misinterpreted on the question of notice. The paragraph cited requires that notice of disability or death due to silicosis be given "the employer" as soon as practicable after the employee has knowledge and requires that claim be made "upon the employer" within three years from the last injurious exposure to silica dust. Unless such notice is given, right to compensation for silicosis is forever barred.

Reliford, within a short time after he left Eastern's employ, was examined by three physicians and X-rayed at four hospitals. He was told by all doctors that he was suffering from silicosis. Prompt notice of this fact was given to Eastern by Reliford himself, who talked personally with Eastern's claim agent a number of times. His claim upon the employer was supported by UMW's

agent who, as the District Court stated, "importuned the defendant in behalf of the plaintiff." During 1951, Eastern arranged to have Reliford take a physical examination with its own doctor, who reported that Reliford did not have silicosis. At the hearing herein the company doctor stated under oath that Reliford's symptoms, as shown by various X-rays introduced in evidence, taken in 1951, were consistent with the first stages of the disease. Eastern's agent, after receiving a number of letters from the UMW agent, in a letter sent October 23, 1952, refused Reliford's claim on behalf of Eastern. The letter did not rely upon the point that the claim was not timely filed, but merely declared that Reliford was not disabled because of silicosis. When the letter of rejection from Eastern's claim agent was sent the one year provided for asking a hearing before the Workmen's Compensation Board had already expired. KRS 342.270.

At a point not definitely fixed in time Reliford's attorney made application to the Workmen's Compensation Board of Kentucky, but was informed by the Board that it did not have jurisdiction because Eastern had not filed an election to operate under the silicosis provision of the Workmen's Compensation Act. The action of the Workmen's Compensation Board in refusing to take jurisdiction of the case is in accord with Kentucky decisions under KRS 342.005 (2). The Court of Appeals of Kentucky under this provision holds that if either the employer or employee does not manifest his election in accordance with the terms of the statute they are not applicable, even though both intended to operate and believed they were covered. *McNeese Construction Co.* v. *Harris*, 273 S. W. (2d) 355. Both employer and employee had to register. *McCune* v. *Dell & Bros.*, 192 Ky. 22. Reliford therefore

took no further steps before the Workmen's Compensation Board and this action was filed March 6, 1956. On April 8, 1957, plaintiff died of silicosis and his wife, Margie Reliford, as administratrix of plaintiff's estate, was substituted in the action.

The District Court denied relief and dismissed the complaint for two principal reasons. One, it held that plaintiff and defendant were under an equal obligation to enter into the voluntary joint application in writing required under KRS 342.316 and that, since plaintiff had failed to make application for benefits of the statute, defendant was not bound by its contract. Two, the court also held that Reliford's claim was barred by the one year provision of the statute of limitations applicable to personal injury.

We think that Reliford's obligation under this record was not equal to that of Eastern. Eastern, in an express written agreement intended to apply to hundreds of employees, had promised that it would "provide" the protection and coverage of the benefits under the Workmen's Compensation and Occupational Diseases Law, whether compulsory or elective. The indispensable first step in fulfilling its agreement was that Eastern itself should elect to be governed by the silicosis provisions of the Workmen's Compensation Act. A statutory form was provided for the employer for that purpose. KRS 342.390. Eastern could not obtain the result that it had promised unless and until it applied for coverage under the occupational diseases provisions of the Workmen's Compensation Act. If Reliford did not join in the election, Eastern would be released from its promise as to Reliford. But Eastern was bound under the contract to attempt to perform its positive obligation.

The District Court held in effect that, since Reliford had not filed his election after being apprised of his physical condition, Eastern was released from the necessity of making timely election. We think this ruling is erroneous. Under the contract Eastern was placed under a positive obligation by its promise to several hundred employees to proceed under the Workmen's Compensation statute immediately after July 1, 1947. The way to proceed was promptly to file an election to operate under the Act.

Moreover, Reliford had already performed his essential obligations under the contract. He had joined the union and in so doing had assented to the manifold provisions of the contract which would govern his working conditions, including even the rent that he might pay for housing, and an obligation to help prevent local strikes.

Under the silicosis statute, KRS 342.005 (2), Reliford was not required to file his election (if he did elect), first or simultaneously with Eastern. The use of the words "joint and voluntary application" in 342.005 (2) does not affect this conclusion.

The statute does not contemplate simultaneous election by employer and employee. Neither the word "joint," which Webster defines as "united; combined," prescribes the precise time at which the union or combination shall take place, nor is the time elsewhere stated. The form required of the employer under KRS 342.390 states "This election is effective as the day of . . . . . and covering (here insert name of industry, business or operation on which the election is made)." This form contemplates an election which shall cover not merely one controversy be-

tween an employer and one employee, but a number of controversies between the employer and all his employees. It is filed by the employer when he subjects himself to the Act. But the individual employees will hardly have silicosis simultaneously with the employer's election nor simultaneously with each other. Thus, in this case, if Eastern, as it promised, had subjected itself to the Act within a month of the execution of the contract of July 1, 1947, Reliford could not have joined in the election at that time for he did not contract silicosis until 1951.

"Joint" in the statute means that the employee who has contracted silicosis, if he chooses, shall join in electing to proceed under the Act to which the employer has already subjected himself. There may be years between the act of the employer and the act of the employee, but when the election is filed by the employee, as to him it becomes "joint."

Eastern prevented any joint election by Reliford (1) by not filing an election in accordance with its promise prior to Reliford's contracting silicosis; (2) by not notifying Reliford, either by posting at the mine or other notice, when it did file. It follows that neither under the contract nor under the statute had Reliford failed to perform. Since no time for performance was specified in the labor contract Eastern was required to file its election within a reasonable time. Four and one-half years we think was not a reasonable time in which to fulfill a promise of this nature.

The contract declares that refusal "shall be deemed a violation of this Agreement." Eastern contends that it did not refuse to carry out the contract, that there could

be no refusal without demand, and that neither Reliford nor the union demanded performance. We think Eastern's failure for four and one-half years from July 1, 1947, to March 1, 1952, to take the steps required by the contract was tantamount to a refusal. While an obligation for the payment of money in certain cases arises only upon demand, when a party is obligated to perform a certain act or acts, failure to act is often held equivalent to a refusal. As held in *Hicks* v. *Conn*, 270 Ky. 344, at 348:

> "The word 'refuses,' like many other words in our language, is elastic and is of somewhat varied signification according to the context in which it is found and the nature of the subject matter to which it refers. Refusal usually implies a previous demand or request or the existence of circumstances equivalent thereto. But, as stated in *Mackey* v. *United States* (C. C. A. 6) 290 F. 18, to 'refuse' does not necessarily imply to deny deliberately a previous demand. One of the general definitions of 'refuse' is to 'withhold.' Webster's New International Dictionary. The word has been given judicial construction as being a synonym of failure. We held in *Thomas* v. *Commonwealth*, 74 S. W. 1062, 25 Ky. Law Rep. 201, that it was not error to instruct that, if defendant 'failed' to leave the house of deceased, the latter had the right to use such force as was necessary to eject him instead of using the word 'refused.' The failure to give bond in a bastardy proceeding was held equivalent to a refusal to do so. *Rudulph* v. *State*, 16 Ga. App. 353, 85 S. E. 365. Where a municipal board took no action upon a claim against the county, it was held to be a refusal to allow it. *Board of Supervisors of Jefferson County* v. *Lessing*, 129 Miss. 1, 91 So. 697.

Failure to file a corporation's report in time required by law constitutes a refusal to do so. *Sherman* v. *Finance Corporation*, 78 Colo. 330, 241 P. 722. The failure of a property owner to lay sidewalks within the time prescribed in an order requiring their construction and with which he had been served was held to amount to a refusal within the meaning of the statute providing that the city could have same done if the owner refused to lay the sidewalk. *City of Bluefield* v. *McClaugherty*, 64 W. Va. 536, 63 S. E. 363."

See also *Ennis* v. *Adkins, Sheriff*, 274 Ky. 121.

Under the contract demand was required neither from Relifford nor from the union in order to establish violation of the contract by Eastern.

Eastern was also in default in carrying out the second important provision of the paragraph involved. It failed to fulfill its promise to post "at the mine" notice of compliance with this section of the contract. It did not, as it had under the original Workmen's Compensation Act, make it easy for employees to signify their acceptance of the statute by signing the proper form of assent.

The purpose of contracting for posting at the mine notice of the employer's compliance, that is, of its election to be subject to the silicosis Act, was not only to inform the employees of the compliance, but also to alert the employees to the action required from individual miners. The notice, properly posted, would have put the employees upon inquiry as to their rights and obligations. This would have secured the cooperation between employer and em-

ployee called for by KRS 342.316. The notices and forms arranged to be put out by the Workmen's Compensation Board would naturally have been made available at the plant. KRS 342.430.

If Eastern had posted notice as required by the contract this case might have had a very different history. As a result of Eastern's complete failure to perform from July 1, 1947, to March 1, 1952, neither its own claim agent nor the union agent proceeded in Reliford's case on the basis of the application of the silicosis provisions of the Workmen's Compensation Act. Eastern's agent said he did not know of the posting of notice under the agreement. So far as this record shows Eastern, after its communication of March 1, 1952, to the Workmen's Compensation Board, said nothing either to Reliford or to his union representative to the effect that Eastern had subjected itself under the Act. The record shows without dispute that both specific provisions of the contract were breached by Eastern. When, in March, 1952, Eastern decided to take action, it wrote an informal letter to the Workmen's Compensation Board to that effect. Reliford's claim had then been pending in its office since the summer of 1951. Eastern sent a copy of this letter to the executive secretary of The Operators' Association, to its claim agent at the mine, and to the general manager at Eastern. This record shows that the matter was never called to Reliford's attention nor to the attention of the union agent negotiating with Eastern's claim agent. This was not the equivalent, either in purpose or effect, of a proper posting of notice at the mine that Eastern was subjecting itself to the silicosis provisions of the law. Eastern's excuse for the long delay, made by its president, is that it "over-

looked" the provision of the contract involved here. This constitutes no legal justification.

The District Court held that Reliford was barred under the silicosis statute because he did not make a claim before the Workmen's Compensation Board within one year of his having silicosis and within three years of his last injurious exposure. But these provisions have no application here because, as the Court of Appeals of Kentucky held in *McNeese Construction Co.* v. *Harris, supra*, "If either the employer or the employee rejected or did not manifest his election in accordance with the terms of the statute, they were not applicable. . . ."

A more difficult question is presented as to the holding that the case is barred because it is an action for personal injury and the Kentucky one year statute applies. Injuries to the person which are joined with or grow out of certain forms of contract have been held by the Court of Appeals of Kentucky to be barred under this provision of the statute of limitations. KRS 413.140. This is under the general rule that all actions, the real purpose of which is to recover for an injury to the person, whether based upon contract or tort, are governed by the statute of limitations which limits the time in which actions "for an injury to the person" may be brought. This doctrine has been applied in a number of Kentucky decisions. *Howard* v. *Middlesborough Hospital*, 242 Ky. 602; *Scott Tobacco Co.* v. *Cooper*, 258 Ky. 795, including a silicosis case, *Columbia Mining Co.* v. *Walker*, 271 S. W. (2d) 276. The same conclusion was reached by this court in *Finck* v. *Albers Super Markets, Inc.*, 136 Fed. (2d) 191, 193, construing the Kentucky statute of limitations for damages growing out of physical injuries. Unquestionably the com-

plaint, with its reliance upon the express contract and its allegations, sustained by the record, that Eastern has violated this agreement, is an action on a contract, but Reliford prays for money recovery for disability arising from silicosis.

We see considerable difference between the situation presented here and those presented in cases of claimed malpractice or negligence which were the gist of the several actions as in the cases cited. Reliford had performed under the contract and might well have filed an election to operate under the Act if he had received notice, through posting at the mine or otherwise, that Eastern had elected so to operate. Reliford's futile inquiry to the Workmen's Compensation Board certainly indicated his desire to take advantage of the Workmen's Compensation procedures. Due to Eastern's failure until March 1, 1952, to elect and at any time to post notice at the mine as required under the contract, Reliford was misled by Eastern as to his remedy. When on March 1, 1952, Eastern mailed its letter of election to subject itself to the silicosis provisions of the Workmen's Compensation Act the bar of the one-year limitation had not yet fallen. On October 23, 1952, the date when Eastern's claim agent denied the claim made to Eastern, the bar of the one-year statute had fallen. The inquiry that Reliford's counsel made to the Board was made to a Board without jurisdiction (1) because Eastern had failed to make timely election to come under the Act; (2) because Eastern had failed to notify Reliford of its election in time for him to act.

We think that the contract between Eastern and its employees involved more than a mere action for personal injuries. It involved the adoption at the Hardy mine of

a particular method of dealing with a situation vital to labor and management. The method of swift and flexible administrative hearing made available in occupational disease cases was planned to supersede the clumsy process of the common law and the unsatisfactory use of continually delaying negotiations between the union steward and company claim agent, such as those demonstrated herein. Moreover, the purpose of the Workmen's Compensation enactments included, so far as practicable, the elimination of common law actions for personal injury growing out of industrial operations. 58 Am. Jur., Workmen's Compensation, 572, Section 2. Reliford's claim was not only for the modest compensation provided by the Act. It was for medical, surgical and hospital services which Eastern would have been required to afford Reliford after it complied with the Act and Reliford joined. KRS 342.020. It was for the payment of the moderate recovery allowance under the Act, not in a lump sum after the miner had died, but in weekly payments beginning on the first payday after seven days after the occupational disease disability. KRS 342.040. It was for the right to have a hearing of the case in a specific nontechnical manner before a Board specially chosen for this purpose, which would control and make allowance for attorneys' fees. Reliford was seeking as to himself the enforcement of the contract solemnly entered into by Eastern for the benefit of several hundred men at the mine and also for Reliford, a contract not carried out for at least four and one-half years.

We think the employer's admitted conduct amounted to a breach of the collective bargaining contract which had been made for employee Reliford's benefit, and that payments which would have accrued under the Workmen's Compensation Act if the employer's obligation had

been performed provide a minimum measure of provable damages proximately resulting from the breach. Therefore, the 15-year statute of limitations applies.

The instant case was tried before *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, decided June 3, 1957, was announced. A previous Supreme Court decision, *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U. S. 437, decided March 28, 1955, had held that the federal court did not have jurisdiction of an action for unpaid salaries claimed to be due under a collective bargaining agreement.

We recognize that the *Lincoln Mills* case, *supra*, held that an action by a union to compel specific performance of an arbitration clause in a collective bargaining agreement constitutes an action to enforce federal rights and that the substantive law to be applied under Section 301(a) of the Labor Management Relations Act of 1947 is federal law. If, under the doctrine of the *Lincoln Mills* case, federal substantive law for the enforcement of collective bargaining contracts, fashioned "from the policy of our national labor laws," is properly to be applied in the case at bar instead of the contract law of the state, our conclusion would not be changed. [See 71 Harv. L. Rev. 1169 (1958).]

The case turned upon the statute of limitations which, although it was the statute of Kentucky, was required by long settled federal law to be resorted to herein.[2] In the

[2] *Bridges* v. *McGraw & Company*, 302 S. W. (2d) 109, and *Dick* v. *International Harvester Company*, 310 S. W. (2d) 514, do not involve any question of limitations. The *Dick* case also construes an amendment to the Kentucky Workmen's Compensation Act enacted subsequently to the sections involved herein.

absence of federal limitations established by Congress, the Supreme Court of the United States has repeatedly held that the state statute of limitations controls. *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U. S. 390; *Rawlings, Receiver* v. *Ray*, 312 U. S. 96; *Cope* v. *Anderson, Receiver*, 331 U. S. 461.

Since the Congress embodied in Section 301(a) of the Labor Management Relations Act no statute of limitations, under the established federal rule the appropriate state statute would in any event be applied. The District Court's error was not in applying the Kentucky statute but, in our opinion, for reasons given above, in applying the one-year limitation covering injuries to the person rather than the fifteen-year limitation applicable to written contracts.

The judgment of the District Court is reversed and the case is remanded for further proceedings in accordance with this opinion.

* * *

DISSENTING OPINION

* * *

MILLER, Circuit Judge, dissenting. As held by the majority opinion, this action would be barred by the statute of limitations if it was treated as an action for personal injuries. There is no valid claim under the Workmen's Compensation Act because the parties did not affirmatively elect to subject themselves to the provisions of the Act. *McNeese Construction Co.* v. *Harris*, 273 S. W. (2d) 355 (Ky.). In order for the appellant to recover, the action

must be considered as one for damages resulting from breach of contract.

I am not in agreement with my colleagues in their ruling that the appellee breached its contract obligation. That obligation was to "provide the protection and coverage of the benefits under Workmen's Compensation and Occupational Disease Laws, whether compulsory or elective, existing in . . ." Kentucky. In Kentucky, coverage under the statute was optional on the part of both the employer and employee. *McCune* v. *Pell & Brother*, 192 Ky. 22, 27. In my opinion, this contract provision eliminated any option on the part of the employer not to operate under the Act. But it could not and did not change in any way what the statute required to be done by both employer and employee in order to make this provision effective. It was still necessary for both the employer and the employee to formally elect to operate under the Act. Under Section 342.005(2), Kentucky Revised Statutes, as it then existed, coverage with respect to the disease of silicosis was obtained only by the "joint, voluntary application to the board, in writing" of the employer and the employee electing to operate under the provisions of the Act. The obligation resulting from the contract and the statute was accordingly a joint obligation. Unilateral action on the part of the employer would not have made coverage effective. *McNeese Construction Co.* v. *Harris*, supra, 273 S. W. (2d) 355 (Ky.). Lack of coverage under the Act resulted from the failure to take joint action, not the failure of the employer to take unilateral action. It is a settled principle of contract law that where no fixed time is provided for performance and the obligations of the parties are joint or concurrent, neither party is in default in failing to perform until requested so to do by the other party to

the contract, accompanied by a tender of performance. *Morris Shoe Co.* v. *Coleman,* 187 Ky. 837, 841; *Morgan* v. *Patillo,* 297 F. 140, 143-144, C. A. 5th; *In re: Independent Distillers of Ky.,* 34 F. Supp. 708, 712, W. D. Ky. Reliford did not elect to operate under the Act. Nor did he ever make any request of the appellee that the necessary joint application be made to the Board. In view of Reliford's failure to make the necessary election and his failure to request the appellee to execute the joint application with him, I do not think that the failure of the parties to have the coverage in effect can properly be construed as a refusal on the part of the appellee to provide the coverage, or as a breach of its contract to provide such coverage. Nor can it be said as a matter of law that if the appellee had taken unilateral action, it would have resulted in Reliford likewise making the necessary election. As the Court pointed out in *Greene* v. *Caldwell,* 170 Ky. 571, 580, the right of election or non-election is left with the employee. "What the employee will do when he comes to decide whether to accept or reject the Act depends on the viewpoint from which he weighs for himself its benefits and disadvantages."

If we assume that appellee breached its contract obligation, we are faced with a troublesome question of damages. Although Reliford lost his right of coverage under the Act, he retained his common law right of action against his employer, which he would have relinquished if he had accepted the provisions of the Act. His enforcement of this right could have resulted in a recovery of as much as or even more than the benefits provided by the Act, in which event he would have suffered no damage at all. Liability, if it existed, was expressly fixed and limited under the Act in contrast to the unlimited liability in a

common law action for damages. Since Reliford failed to avail himself of his common law right of damages, it is pure speculation at the present time to attempt to determine what, if any, damages he may have suffered by appellee's alleged breach of contract. Such damages can not be made the basis of a recovery. *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444; *Boatright* v. *Steinite Radio Corporation*, 46 F. (2d) 385, 390-391, C. A. 10th; *Holliday* v. *Spahr*, 274 Ky. 556, 561. I recognize the rule that in cases where the fact of damage is certain, the uncertainty of the amount does not prevent a recovery. But where the fact of damage is itself uncertain and speculative, as in the present case, there can be no recovery other than nominal damages. Compare: *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 688.

I would affirm the judgment of the District Court.

[Caption Omitted]

MEMORANDUM ON PETITION FOR REHEARING.

Decided November 10, 1958

Before ALLEN, Chief Judge, MILLER, Circuit Judge, and MATHES, District Judge.

ALLEN, Chief Judge. In its brief upon petition for rehearing appellee announces that it abandons the theory on

which it tried the case below. It is the practically universal rule that this cannot be done. See: 3 Am. Jur. 35, Section 253, and 3 Am. Jur. 372, Section 830 (Appeal and Error), and many decisions of the Supreme Court of the United States and of the various states cited therein; *Virginian Railway Company* v. *Mullens*, 271 U. S. 220.

The reason advanced for appellee's drastic shift in viewpoint is that the Supreme Court of Kentucky in *Dick* v. *International Harvester Company*, 310 S. W. (2d) 514, has changed the applicable law. It is said that under *Vandenbark* v. *Owens-Illinois Glass Company*, 311 U. S. 538, we are compelled to review the case under the law as it now is.

A material factual difference between the *Dick* case and the instant case is that the employer herein expressly promised to post "at the mine" notice of compliance with its agreement to "provide the protection and coverage of the benefits under Workmen's Compensation and Occupational Disease Laws, whether compulsory or elective * * *." Appellee concedes that it did not comply with this important term of the contract. As a result of this material breach by appellee, Reliford was denied the practical notice essential to the preservation of his rights.

As set out at length in the *Dick* case, *supra*, the law of Kentucky up to the amendments of 1956 to KRS 342.005 (1) and (2) required a special election by the employer in order to operate under the silicosis provisions of the Workmen's Compensation Act. (Reliford had retired from active service in 1951 because of silicosis.) While the amendment of 1952, KRS 342.395, 1953 edition, provided that an employee by his contract of hiring was deemed to

have accepted all provisions of the Workmen's Compensation Act and to be bound thereby unless he filed written notice with the employer to the contrary, this amendment specifically provided that the section was in force "In the event an employer elects to operate under this chapter." Appellee violated its express contract made July 1, 1947, not only to provide the benefits of the Workmen's Compensation Act, but to post notice at the mine. Although appellee finally on March 1, 1952, made an informal election by letter to the Board to comply with the silicosis provisions of the Act, while Reliford's case was pending before its claim agent, appellee neither notified Reliford, Reliford's union agent, nor appellee's own claim agent, of the existence of that letter, and never during the period involved posted any notice at the mine for the information of the employees. Under the law then in force it is hard to conceive of action by the employer better calculated to deceive and do detriment to the employee in respect to providing "the protection and coverage of the benefits under Workmen's Compensation and Occupational Disease Laws" for the employee. We think this action of appellee constituted an instance of the "detriment or deception" referred to in the *Dick* case, *supra*, 518. When informed by the executive secretary of the Workmen's Compensation Board, in accordance with the then existing law that (presumably because of lack of an election by appellee) it had no jurisdiction, Reliford naturally concluded to seek his alternative remedy. Having no notice that appellee had elected, Reliford was not required to file written notice of rejection.

The alternative remedy was to bring an action at common law. The fact that Reliford chose to sue in contract rather than in tort was immaterial. KRS 342.415, still

in effect, recognizes that an employee who does not elect to operate under the Act may file a suit at law. Appellee concedes that Reliford had this alternative remedy. Since Reliford had a choice between the remedy under the Workmen's Compensation Act and under the common law, he was not compelled, either by the contract with appellee or under the law of Kentucky, to come within the operation of the statute. *Greene* v. *Caldwell,* 170 Ky. 571. His action on the contract was filed prior to the amendment of August 1, 1956, KRS 342.005 (1) and (2), and was filed while the law still required, as pointed out at length in the *Dick* case, a special election to operate under the Act to be made by joint, voluntary application. *Dick* case, *supra,* 515.

That Reliford was compelled to exhaust the remedy under the Workmen's Compensation Act before filing suit, when he had chosen the remedy of filing an action at law and had not chosen the remedy under the Act, seems to a majority of the court to assert a proposition unsound in principle and supported by no authority. We are cited to no case that holds that when a plaintiff has two alternative remedies he has to exhaust the remedy he does not choose to adopt before choosing to adopt the other.

As to the case presented herein, the *Dick* decision did not change the existing law. On the contrary, it declared that the law followed by Reliford was in existence up to and beyond the time that he filed his suit on the contract. It follows that *Vandenmark* v. *Owens-Illinois Glass Company, supra,* and the line of cases represented by *Transcontinental and Western Air, Inc.,* v. *Koppal,* 345 U. S. 653, while they declare well established rules of law, are not controlling here.

The majority adheres to its previous decision.

No. 13,284.

MILLER, Circuit Judge, dissenting. At the time of the filing of the original briefs on this appeal, the Kentucky Court of Appeals had not decided the case of *Dick* v. *International Harvester Co.*, 310 S. W. (2) 514. At the time of oral argument by counsel before this Court the ruling of the Court in that case was under reconsideration upon petition for rehearing and had not been published. Appellee's position taken in its original brief and urged upon us in oral argument was without consideration of the effect which that case had upon the law of Kentucky with respect to the issues involved in this case. It has materially changed the Kentucky law applicable to the case.

Appellee's present petition for rehearing frankly states that by reason of the ruling of the Kentucky Court of Appeals in *Dick* v. *International Harvester Co., supra*, there is a necessary change in the position which he took on behalf of the appellee by brief and argument hereinabove referred to. His new position in the case is presented in the present petition for rehearing. Although the *Dick* case had some consideration by this Court in making its earlier ruling, the Court in doing so did not have the benefit of appellee's change of position and argument in support thereof, which is now urged upon us. This requires a reconsideration of the case at the present time from that viewpoint giving full consideration to the effect of *Dick* v. *International Harvester Co., supra*. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Doggrell* v. *Southern Box Co.*, 208 F. (2) 310, C. A. 6th.

As held in *Virginian Railway Co.* v. *Mullens*, 271 U. S. 220, a plaintiff may not, after bringing and trying his case on the theory stated in the complaint, thereafter on review change to another theory of liability, which the defendant was not required to meet in the lower court. It is also the rule that generally an appellant may not rely for *reversal* in an appellate court on grounds not urged by it in the lower court. *Helvering* v. *Wood*, 309 U. S. 344, 348-349. However, such a rule does not apply to a defendant who has been successful in the lower court and seeks to *affirm* the judgment on appeal for legal reasons not relied upon by the trial court in rendering judgment in his favor. As stated in *Helvering* v. *Gowran*, 302 U. S. 238, 245, "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." See also: *J. E. Riley Investment Co.* v. *Commissioner*, 311 U. S. 55, 59; *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 88; *Jaffke* v. *Dunham*, 352 U. S. 280. The rule has been heretofore applied by this Court. *Mills Novelty Co.* v. *Monarch Tool & Mfg. Co.*, 49 F. (2) 28, C. A. 6th, cert. denied, 284 U. S. 662; *American Eagle Fire Ins. Co.* v. *Gayle*, 108 F. (2) 116, 117, C. A. 6th, cert. denied, 309 U. S. 686; *Payne & Williams Co.* v. *Baldwin Rubber Co.*, 113 F. (2) 840, 844, C. A. 6th; *Cold Metal Process Co.* v. *McLouth Steel Corp.*, 126 F. (2) 185, 189, C. A. 6th. In the present case the appellee was the defendant in the trial court and is seeking to affirm the judgment of that court on legal grounds available to him on the record, although different from those relied upon by the District Judge. I am of the opinion that it is entitled to do so.

I construe *Dick* v. *International Harvester Co.*, *supra*, as

holding (1) the execution by the employer of a collective bargaining contract with the union which obligates the employer to comply with the Workmen's Compensation and Occupational Disease Laws of the State of Kentucky is in itself as a matter of law an election to operate under those laws, making it unnecessary for the employer to execute and file with the Board the joint application for coverage under the Act heretofore required, and (2) under the Amendment to the Workmen's Compensation Act of June 19, 1952, one who may be employed at the time of the acceptance of the provisions of the Act by the employer shall be deemed to have accepted all the provisions of the Act, unless he shall have filed written notice with the employer to the contrary. *Section 342.395, Kentucky Revised Statutes.*

This amendment was in effect on October 23, 1952, at which time appellee denied in writing Reliford's claim for compensation on account of silicosis, taking the position that the evidence did not show that he was disabled on account of silicosis. The amendment was in effect at the time shortly thereafter when Reliford's attorney contacted the Workmen's Compensation Board about filing a claim for compensation under the Act. The Executive Secretary of the Board advised Reliford's attorney that because appellee had not made application for coverage for occupational disease the Board lacked jurisdiction. Under the ruling in *Dick* v. *International Harvester Co., supra,* and the Amendment of June 19, 1952, this construction of the law was not correct and the Board did have jurisdiction of the claim. We are required to review the case in accordance with the law as it now is. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538; *Doggrell* v. *Southern Box Co., supra,* 208 F. (2) 310, C. A. 6th; *United States* v.

Killian, 246 F. (2) 77; 82, C. A. 7th. The time limitation for filing a claim was at that time three years, although it was shortened to one year in 1956. *Sections 342.185, 342.316, Kentucky Revised Statutes.* Accordingly, there was no breach of appellee's contract obligation to provide this coverage.

The failure to obtain compensation under the Act was because Reliford did not press his claim. Reliford accepted the statement of the Executive Secretary of the Board. Reliance upon this statement is not chargeable to the appellee. No claim for Workmen's Compensation benefits was filed with the Board. This failure to press his claim is not excused by the fact that at the time it did not appear worthwhile. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-52, and cases cited in notes 9, 10 and 11 on p. 51. See: *Sunal* v. *Large*, 332 U. S. 174, 181; *Ackermann* v *United States*, 340 U. S. 193, 197-198. Counsel for claimant in *Dick* v. *International Harvester Co., supra*, was confronted with a similar problem, but, nevertheless, pressed his claim, unsuccessfully before the Board, but with ultimate success before the Court of Appeals.

If the foregoing view of the case is correct, Reliford did not have available to him the alternate remedies of pressing his claim before the Board or filing an action at law either for breach of contract or tort. If the Board had jurisdiction of the claim, his exclusive remedy was before the board. *Section 342.015, Kentucky Revised Statutes.*

I do not think that appellee's failure to post at the mine notice of compliance with its agreement to provide protection for occupational disease constitutes a legal basis for the present action. Considered in the light of what the law

was at the time the agreement was made, the notice of compliance referred to notice of the expected formal application by appellee to the Board to operate under the provisions of the Act. Since coverage under the Act, insofar as Reliford's claim is concerned, results from operation of law, effective in March, 1958, by virtue if the ruling in *Dick* v. *International Harvester Co., supra,* rather than by a formal application contemplated by the agreement, a notice of compliance could not have been legally posted until after the decision in *Dick* v. *International Harvester Co., supra,* in March, 1958. The failure to post a notice did not affect Reliford who, notwithstanding the failure to post such a notice, knew what the facts were, namely, that at the time his attorney contacted the Board in October or November, 1952, appellee had executed a contract with the union obligating it to provide protection for occupational disease, but had not filed a formal application for it. There was nothing additional that appellee could give notice of. Failure to post a notice of compliance at the mine was not the cause of Reliford's failure to obtain an award of compensation from the Board. The cause of the loss of compensation was appellee's failure to make formal application for coverage, which Reliford knew about, making notice of that fact unnecessary, and Reliford's reliance upon what was thought to be the law of Kentucky at the time which reliance later proved to be not justified. So the real question in the case remains the same, not the failure to post a notice but the alleged failure to provide the coverage.

There is another aspect of this case which requires consideration. The collective bargaining contract contained provisions for the settlement of local and district disputes between the operators and the miners, starting with con-

ferences between the aggrieved party and the mine management, and if not there settled, to be carried on through successive higher levels. This is a contract obligation. It excludes alternative remedies. Appellee's answer sets out these provisions and alleges the failure on the part of Reliford to comply with this contract obligation before resorting to court action. Such failure appears to constitute a legal bar to the maintenance of this action. *Transcontinental & Western Air, Inc., v. Koppel*, 345 U. S. 653, 662; *Tharp* v. *Louisville & N. R. Co.*, 307 Ky. 322, 325; *Barker* v. *Southern Pac. Co.*, 214 F. (2) 918, C. A. 9th.

I am of the opinion that the petition for rehearing should be granted and the judgment of the District Court affirmed.

DICK v. INTERNATIONAL HARVESTER COMPANY

310 S. W. 2d 514 (Ky.)

STANLEY, Commissioner.

Isaac S. Dick, an employee of the International Harvester Company, became disabled by silicosis and applied for workmen's compensation. After an appeal from a judgment confirming the denial of an award by the Compensation Board was filed, Dick died, and the case was revived by his administratrix.

The claim arose before the effective date of the amendment of KRS 342.005(2) by an Act of 1956 (1, Ch. 77. Acts of 1956), which did away with a special acceptance of silicosis coverage. Before the amendment the statute contained the provision, "and any employers and

their employees may, with respect to the disease of silicosis caused by the inhalation of silica dust, in like manner voluntarily subject themselves thereto as to such disease." The "like manner" was "by joint voluntary application to the board in writing." This was construed as being specially elective and that disability from silicosis was not compensable if the parties had not complied. *Nolley* v. *Diamond Coal Co.*, 291 Ky. 849, 165 S. W. 2d 841; *Eastern Coal Corp.* v. *Morris*, Ky., 287 S. W. 2d 603. It is agreed in this case that there was no written application or notice of election filed with the Board.

We have a clear case of an industrial disability which apparently caused the death of a faithful employee. Isaac S. Dick had worked in the mines 29 years and had been an employee of the International Harvester Company for a period of five years until his disability compelled him to quit work. If his disability had occurred a short time later, when the statute had been amended, there would be no question of its compensability. Strictly measured, there was no compliance with the law in effect when the disability occurred. The question is presented whether there was such an election (1) by the workman by virtue of a statutory presumption, and (2) by the employer by virtue of the legal effect of its contract with the workman's union or by estoppel to deny its election.

(1) We approach the decision under the influence of the remedial principle of workmen's compensation and the development and progress of legislation to accomplish its humane and beneficent purpose. This is coupled with the express mandate of the statute that the Act "shall be liberally construed on questions of law." KRS 342.004. Therefore, any doubt as to its scope and application with

respect to disabilities or injuries where the facts have been found must be resolved in favor of the workman or his dependents. All presumptions will be indulged to accomplish that end. *Consolidated Coal Company's Receiver* v. *Patrick*, 254 Ky. 671 72 S. W. 2d 51; *Adams* v. *Bryant*, Ky., 274 S. W. 2d 791.

For many years the statute required every workman to sign a register signifying his agreement or election to work under the Compensation Act. Experience revealed that often this was not done through neglect or occasionally, through some deliberate omission or conduct on the part of the employer. More often difficulty of proving acceptance was encountered. So, progressive legislation has been enacted to protect a workman's rights in this regard. In 1948 the Act was amended to simplify the manner of acceptance by the employee. Then, in 1952 the statute was again amended to provide that in the event an employer had elected to operate under the Act, the employee by virtue of and as a part of his contract of hiring "shall be deemed to have accepted all provisions of this chapter and shall be bound thereby" unless he shall have filed written notice with the employer to the contrary. Acts of 1952, Ch. 82, now KRS 342.395, 1953 edition. See *Wells* v. *Jefferson County*, Ky., 255 S. W. 2d 462, sustaining the constitutionality of the amendment.

(2) This workman, Isaac S. Dick, applied for benefits on January 8, 1956, which was four years after the law made his contract of hire an election of all the provisions of the act. There is no indication that he ever gave a notice to the contrary. At the time this man became disabled silicosis was not regarded as being an occupational disability within the general coverage of the Act, but, as shown

above, it could be brought within the coverage in the same way in which the parties had previously brought themselves under the Act generally, namely, "by joint voluntary application to the board." KRS 342.005(2). The conclusion, therefore, is that Dick had by operation of the statute accepted the provision of the statute which declares disability by silicosis to be compensable.

We may add for clarification in cases arising after August 1, 1956, that when the 1956 Act amended subsection (1) of KRS 342.005 to specifically include disability from silicosis within general coverage, along with traumatic personal injury, the provision in subsection (2) of that section for a special election to include silicosis disability was eliminated. To make this amendment and elimination clear and certain, KRS 342.005 was amended by adding the specific clause that acceptance of the Act by an employee by virtue of his contract of employment shall include "silicosis and any other occupational disease." Ch. 77, 1 and 14, Acts of 1956, now incorporated in the 1956 edition of the Kentucky Revised Statutes.

(3-5) We turn to the question of whether the employer, who had not formally or specially accepted the silicosis provision, should be deemed as a matter of law and justice to have done so.

From the beginning of workmen's compensation legislation the statute has provided that election by an employer to operate under the Act generally shall be effected by filing a notice of election with the Compensation Board, KRS 342.290, formerly 4956, Kentucky Statutes. This was and is "the event" referred to in KRS 342.395 declaring that the contract of hiring shall be deemed to have been

an acceptance of all provisions of the Act. Our earlier cases required as a condition to allowing compensation to an injured workman or his dependents in case of his death that his employer had actually filed a written acceptance with the Board. But later cases departed from that legalism and held, notwithstanding a failure to comply with the prescribed formalities, that any substantial step taken to accomplish that end would be regarded as an election to operate under the Act if failure to go through with it misled or resulted in detriment to the employee. This, of course, rests on estoppel. It may be here observed that while a proceeding in a workmen's compensation case is under a statute, it is special in character and should be treated as equitable to the extent that the adjudication of a claim requires the proper application of the rules of equity. 58 Am. Jur., Workmen's Compensation 403.

In the case before us the bargaining agreement between the International Harvester Company and its employees' labor union, of which Dick was a member, contained this section:

> "Workmen's Compensation and Occupational Diseases.
>
> "Section 6. The company will comply with the Workmen's Compensation and Occupational Disease Laws of the State of Kentucky."

In these later years not many employers in industry deal with each employee separately as regards wages, working conditions and related labor questions. This aspect of the case, namely, the contract between the employer and

all its employees through and by a labor union, like the progressive legislation to assure compensation to workmen for industrial disability, is a development of the times. The bargaining contract in this case is of the customary comprehensive character. In making it the union was the authorized agent and representative of its members, and all parties are bound by it. *Day* v. *Louisville & Nashville R. Co.*, 295 Ky. 679, 175 S. W. 2d 347; *Hill* v. *United Public Workers Union*, 314 Ky. 791, 236 S. W. 2d 887. So, in dealing with the agent the company dealt with each member of the union represented by it.

> The company contends that by this contract it had done nothing more than agree to join with its numerous employees, acting individually and separately, to elect to come within the silicosis coverage whenever the employees requested it. Its explanation given in evidence is that it was waiting until each employee made the first move.

As we have seen, the enactment of the 1952 amendment had the effect of constituting this man's contract of employment an election on his part to accept all provisions of the Act. The fact that Dick had in law already elected was apparently overlooked by the company. In any event, the company had unqualifiedly committed itself to Dick and other members of the union that it "will comply with the Workmen's Compensation and Occupational Disease laws" of the state. Silicosis was at the time regarded as an occupational disease, although not within the general coverage. *Jones* v. *Crummies Creek Coal Co.*, Ky., 264 S. W. 2d 294. This provision could well be regarded as constituting an election by the company. It certainly had that effect so far as the employees were concerned. But the

company did not go through with its election by notifying the Compensation Board. In *L. E. Marks Co.* v. *Moore*, 251 Ky., 63, 64 S. W. 2d 426, we held that the employer was estopped to deny it was operating under the Act where it had executed an application to do so and had left it to an agent to file with the Board and he had failed to file it. The employee had signed the register signifying his acceptance and was advised that the employer was operating under the Act. The only material difference between this case and the Marks case is that here the employee had a promise looking to the immediate future, while in the Marks case there was a statement of part acceptance, when as a matter of fact, the employer had only begun the procedure and through negligence had not consummated the acceptance.

In *Ginn* v. *Walker*, Ky., 273 S. W. 2d 840, we held the accidental death of a man working on a farm for an employer who had less than three employees was not compensable because the employee had not joined with his employer in an application to operate under the Act. The section of the statute which required a farmer or an employer of fewer than three persons and his employees to make a special election to come under the general coverage is the same as that which required a special acceptance of the silicosis provision by those already under general coverage. KRS 342.005(2). The opinion does not show that the accident occurred after the 1952 amendment to KRS 342.395(2), which creates the presumption of an employee's acceptance. If it did so occur, the presumption was not called to our attention. The element of estoppel was not considered.

In the case at bar the opinion of the Board that no com-

pensation could be awarded is based on the Ginn case.

Since the present case was decided by the Board and the circuit court, we have rendered the opinion of *Carrs Fork Coal Co.* v. *Yancey*, Ky., 297 S. W. 2d 914, 917. In that case we referred to the skimpy and unsatisfactory record in the Ginn case and construed that opinion to be "authority only for the principle that it takes more than bare intention to satisfy the requirements of the subsection (2) (KRS 342.395(2)) concerning the duty of the employer and employee to make 'joint, voluntary application to the board, in writing' before coverage is invoked."

In the Carrs Fork Coal Company case the Compensation Board, following the Ginn case, had dismissed an application for compensation for silicosis disability solely upon the ground that the parties had not actually filed a joint application according to the terms of KRS 342.005 (2), although it appeared proceedings short of filing had been taken by both parties. Reviewing our several cases relating to an estoppel of an employer to deny acceptance of the Act generally, we held the doctrine to be "firmly established in compensation law" and to be applicable to the acceptance of the silicosis section of the Act. We affirmed the judgment which remanded the case to the Board for a trial on the merits and a determination of the matter of estoppel in relation to such finding of facts. In the present case there was "more than a bare intention to satisfy the requirements" of the Act relating to "application to the board, in writing." There was a binding contract that International Harvester Company "will" do so.

We cannot agree with the appellees' argument in the present case that the element of detriment or deception of

the employee is absent. On the one part we have his acceptance of the silicosis provision as a matter of law. On the other part we have a contract of the company made with his agent that it would accept all its terms as to occupational diseases. The employee had the right to rely upon that commitment or that election, whichever way it may be regarded. We may attribute to him the belief that he was or would be covered by Workmen's Compensation, *Smith Coal Co.* v. *Feltner*, Ky. 260 S. W. 2d 398, and a reliance upon the company not taking advantage of its own failure to actually file the necessary formal application or notice with the Compensation Board, and not taking the position it was not liable for his disability because of that failure. *Jones* v. *Crummies Creek Coal Co.*, Ky. 264 S. W. 2d 294. We hold that appropriate compensation should be awarded the appellant.

The case has been fully developed and the facts are undisputed. Unlike the Carrs Fork case, there is no need for this case to be remanded to the Board for any finding of fact upon which the ultimate decision of law as to liability must rest. It is, however, necessary that the Board find the amount of the compensation, and the circuit court should remand the case to the Board for that purpose.

The judgment appealed is reversed with directions to enter another judgment in conformity with this opinion.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 23 1959

BRIEF FOR THE RESPONDENT IN OPPOSITION

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 23 1959
JAMES R. BROWNING, Clerk

In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1958

No. 684

EASTERN COAL CORPORATION PETITIONER

v.

MARGIE RELIFORD, Administratrix of the Estate of Henderson G. Reliford, Deceased RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

DAN JACK COMBS
Pikeville, Kentucky
Counsel for Respondent

FRANCIS DALE BURKE
Pikeville, Kentucky
Of Counsel for Respondent

PROOF OF SERVICE

I, DAN JACK COMBS, one of the attorneys for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify, that on the 20th day of March, 1959, I served copies of the foregoing Brief in opposition to the Petition for writ of Certiorari on petitioner by mailing a copy in self-addressed envelopes with first class postage prepaid, to its respective attorneys of record, as follows:

George Richardson, Jr., Esq., Attorney for Petitioner
Law and Commerce Building, Bluefield, West Virginia

J. Peyton Hobson, Jr., Esq., Of Counsel for Petitioner
First National Bank Building, Pikeville, Kentucky

Albert Kemper, Jr., Esq.; Of Counsel for Petitioner
Bluefield, West Virginia.

Dan Jack Combs

DAN JACK COMBS
Pikeville, Kentucky
Attorney for Respondent

INDEX

Subject to Index

		Page
I.	Questions Presented	2
II.	Statement of the Case	2-4
III.	Argument	4-16
	No grounds for certiorari shown by petitioner	4-6
	Question presented by the petitioner	6-9
	Kentucky Statutes cited by the petitioner	9-10
	The decisions of the Court of Appeals for the Sixth Circuit do not conflict with the decision of the Court of Appeals of Kentucky in the Dick case	10-15
	The decision of the Court of Appeals as to procedural and substantive questions do not conflict with decisions of this Court	15-16
IV.	Conclusion	16

TABLE OF CASES CITED

Dick v. International Harvester Company
Ky. 310 SW 2d 514 ..... 2, 4, 5, 6, 10, 11, 12, 13

Page

Forsyth v. Hammond
166 U.S. 506, 514; 41 L. Ed. 1095 5

Gatliff Coal Company v. Cox
142 F. 2d 876 (Sixth Circuit) 6-7

Layne & Bowler Corp. v.
Wester Well Works, Inc.,
261 U. S. 387; 67 L. Ed. 712 5

McNeese Construction Co. v. Harris
Ky. 273 SW 2d 355 9

Eastern Coal Corporation v. Morris
Ky. 287 SW 2d 603 ..... 3, 14, 15

Tharp v. L. & N. Railroad Company
307 Ky. 322, 325; 210 SW 2d 954.... 8

STATUTES

K. R. S. 342.395 ..... 11, 12

K. R. S. 417.010 8

K. R. S. 342.005 (2) 9

In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1958

No. 684

EASTERN COAL CORPORATION PETITIONER

v.

MARGIE RELIFORD, Administratrix of the Estate of Henderson G. Reliford, Deceased RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully states that a Writ of Certiorari should not issue to review the decisions

and opinions of the United States Court of Appeals for the Sixth Circuit rendered on June 26, 1958, and November 10, 1958, respectively on the grounds assigned by the petitioner.

QUESTIONS PRESENTED

(1) Did the Court of Appeals decide the question of state law herein presented in conflict with the decision of the Court of Appeals of Kentucky in the case of Dick v. International Harvester Co., Ky., 310 SW 2d 514?

(2) Did the Court of Appeals decide substantial procedural and substantive questions in conflict with the decisions of this Court?

STATEMENT OF THE CASE

Respondent's late husband, Henderson G. Reliford, was a coal miner and a member of the United Mine Workers of America. Both the decedent and the petitioner were bound by the terms of the National Bituminous Wage Agreement. Petitioner operates coal mines in Pike county, Kentucky and decedent worked in petitioner's mines for many years. During his employment and as a result of his exposure to harmful dust particles, he contracted silicosis and was forced to leave the mines in June, 1951. His condition was unsuccessfully treated in various hospitals in West Virginia and Kentucky.

Decedent made inquiry to and was advised by the Workmen's Compensation Board for the Commonwealth of Kentucky that it did not have jurisdiction

of claims against the petitioner for silicosis due to the fact that the parties had failed to elect to be bound by the silicosis provisions of the Workmen's Compensation Law of Kentucky.

Being thus advised of the position of the Workmen's Compensation Board and aware of the opinion of the Court of Appeals of Kentucky in the case of Eastern Coal Corporation v. Morris, Ky. 287 SW 2d 603, decided in February, 1955, decedent filed an action against petitioner in March 1955 in the District Court alleging a breach of the National Bituminous Wage Agreement under which petitioner had promised and agreed to "provide the protection and coverage of the benefits under Workmen's Compensation and Occupational Disease Laws, whether compulsory or elective."

At this time silicosis was the only occupational disease compensable under the Workmen's Compensation Laws for the Commonwealth of Kentucky. In this action decedent sought to recover a sum in damages equal to the amount he would have been entitled to before the Workmen's Compensation Board of Kentucky had petitioner performed its covenant under the Wage Agreement and provided him the occupational disease coverage existing under the Workmen's Compensation Act of Kentucky, which was elective in form.

The trial court dismissed decedent's complaint. (See Reliford v. Eastern Coal Corporation, 149 F. Supp., 778). An appeal was perfected and prosecuted to the Court of Appeals for the Sixth Circuit wherein the trial court was reversed and the case remanded for further proceedings.

In the meantime, the Court of Appeals of Kentucky decided the case of Dick v. International Harvester Company, supra, in which it held that the company was estopped to deny its election to operate under the silicosis provisions of the Workmen's Compensation Act of Kentucky under the facts in that case and the statutes then in effect.

Armed wih this opinion petitioner abandoned its original theory of the case and petitioned the United States Court of Appeals for the Sixth Circuit for a rehearing on the ground that the Court of Appeals of Kentucky in the Dick case had changed the law applicable to the case at bar. A majority of the Court of Appeals for the Sixth Circuit adhered to their previous decision and denied the petition for rehearing, (See Reliford v. Eastern Coal Corporation, 260 F 2d 447), on the express ground that there had been no change in the state law.

ARGUMENT

NO GROUNDS FOR CERTIORARI SHOWN BY PETITIONER

It is a fundamental rule of law that a petitioner is not entitled to a Writ of Certiorari as a matter of right, but the question of the issuance of the Writ is in the sound discretion of the Court. It will only be issued upon satisfactory showing of the public importance of the question involved as distinguished from that of the parties; in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals, or a circuit court

of appeals and a state court, or some matter affecting the interest of this nation in its internal or external relations.

Forsyth v. Hammond
166 U. S. 506, 514
41 L. Ed. 1095

Petitioner is seeking the issuance of a Writ on the sole ground that the Court of Appeals for the Sixth Circuit has decided this case in conflict with the decision of the Court of Appeals of Kentucky in the case of Dick v. International Harvester Company, supra. (Ap. pp. 59-67).

If such a conflict actually exists, the Writ may properly issue. If, on the other hand, no real or embarrassing conflict exists, then it would be improvident to grant the Writ.

Layne & Bowler Corporation v.
Western Well Works, Inc., et al
261 U. S. 387
67 L. Ed. 712

This precise question was raised by petitioner in its petition for rehearing filed in the Court of Appeals for the Sixth Circuit. In disposing of this contention, the majority said: "As to the case presented herein, the Dick decision did not change the existing law. On the contrary, it declared that the law followed

by Reliford was in existence up to and beyond the time that he filed his suit on the contract." (Ap. 53).

In addition to such holding, the Court carefully analysed the instant case and the Dick case and distinguished the two on their facts.

QUESTIONS PRESENTED BY THE PETITIONER

The decisive question in this proceeding is whether or not the Court of Appeals for the Sixth Circuit has decided this case on appeal in conflict with the decision of the Court of Appeals of Kentucky in the case of Dick v. International Harvester Company, supra.

Three of the five questions presented by petitioner embrace this pivotal issue. For that reason we will dwell at some length on that proposition after first disposing of petitioner's two remaining questions.

By its third question, petitioner raises the question of the effect of respondent's failure to resort to the grievance procedures provided in the contract. Petitioner ignores, in its entirety, the law of Kentucky upon this question and in particular the opinion of the Sixth Circuit in the case of Gatliff Coal Company v. Cox, 142 F. 2d 876. In that case an employee instituted action for wages claimed to be due under the same collective bargaining agreement as in the case at bar. With regard to the necessity of exhausting

the grievance procedure provided for in the contract as a condition precedent to the maintenance of an action at law on the contract for wages due, the Court had this to say:

> "It is the law in Kentucky that an agreement between parties to a contract to arbitrate all of the disputes thereafter to arise thereunder is invalid and unenforceable as constituting an attempt to oust the legally constituted courts of their jurisdiction and to set up private tribunals, but that if the matter to be submitted to arbitrators was the mere finding of a fact or facts, the determination of which is essential to the accrual of the cause of action itself, such arbitration or finding becomes a condition precedent to the right to sue and is therefore not within the general rule. The provision for arbitration in the case at bar being one to cover all disputes thereafter arising under the contract and not being confined to the ascertainment of a fact essential to the existence of the cause of action itself, comes clearly within the Kentucky general rule that it is not binding upon either part. Appellee therefore in the establishment of his case was not called upon to prove that he had submitted or offered to submit his claim to the method of arbitration provided in the contract on which he sues. Continental Insurance Company v. Vallandingham, 116 Ky 287, 76 SW 28, 105 Am. St. Rep. 218; Ison v. Wright, Ky., 55 SW 202; Gaither v. Daugherty, Ky., 38 SW 2; Jones v. Jones, 229 Ky 791, 16 SW 2d 503. Under the statutory law of Kentucky,

an agreement to arbitrate is binding only if it states in writing the matter to be submitted and the names of the arbitrators. Kentucky Revised Statutes § 417.010" (P. 881)..

That same case distinguishes such cases as that of Tharp v. L & N. Railroad Company, 307 Ky 322, 325; 210 SW 2d 954, cited by petitioner in the following language:

"The Kentucky courts have decided that where parties have agreed on a method of arbitration **pursuant to a statutory regulation**, such agreements are valid. Norfolk & Western Railway Company v. Harris, 260 Ky 132, 84 SW 2d 69; Northern States Contracting Company v. Swope, 271 Ky 140; 111 SW 2d 610." (P. 881) (Emphasis ours).

The Tharp case arose under the Railway Labor Act and constitutes no authority whatsoever in the case at bar.

The fifth question presented by the petitioner is, in our opinion, a feeble attempt to confuse the issue. At best, it is a desperate distortion and perversion of the record unleavened by equity, logic and authority.

Respondent's decedent attempted to recover judgment against petitioner for its failure to provide him with the protection and benefits of the occupational disease laws of the Commonwealth of Kentucky. This

failure is the basis of respondent's claim. This same contractual provision provides that notice of compliance with that term of the contract must be posted at the mine, which was admittedly not done. It must be noted that the entire Wage Agreement was filed and that this provision was a part of the covenant of the contract for the breach of which the respondent sought damages. As said by the majority opinion, (Ap. p. 51), "As a result of the material breach by appellee, Reliford was denied the practical notice essential to the preservation of his rights."

KENTUCKY STATUTES CITED BY PETITIONER

The statutes cited by the petitioner are an accurate summation of these statutes. Respondent, however, denies the application of those statutes to the case at bar. (Ap. pp 20-31). It is our contention that since the petitioner failed to perform its covenant to the decedent by initiating the steps necessary to effect a joint voluntary application to the Workmen's Compensation Board of Kentucky as required by KRS 342.005 (2) effective at the time decedent's cause of action arose, and since there was no election to be bound by the Act, the compensation statutes are, inapplicable. (See McNeese Construction Company v. Harris, Ky., 273 SW 2d 355). Consequently, the statutes cited by petitioner have no place in the determination of the legal rights of these parties other than

serving as a yardstick to determine the measure of damages flowing from petitioner's admitted breach of its collective bargaining agreement.

THE DECISIONS OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DO NOT CONFLICT WITH THE DECISION OF THE COURT OF APPEALS OF KENTUCKY IN THE DICK CASE.

To shed further light on this basic contention of petitioner, we must compare the fact of the Dick case with those of the case at bar.

The factual comparison may be made as follows:

(1) Respondent and Dick were both coal miners of many years faithful service to their respective employers.

(2) Both contracted silicosis while working in employers' mine.

(3) Both died as a result of such disease.

(4) Dick worked under a collective bargaining agreement which provided that "the company will comply with the Workmen's Compensation and Occupational Disease Laws of the State of Kentucky."

(5) Reliford worked under a collective bargaining agreement considerably broader in scope with regard to such matters, the covenant being that "each operator who is a party to this agreement will provide the protection and coverage of the benefits under Workmen's Compensation and Occupational Disease

Laws, whether compulsory or elective, existing in the states in which the respective employees are employed. Refusal of any operator to carry out this directive shall be deemed a violation of this agreement. Notice of compliance with this section shall be posted at the mine."

(6) Dick had the benefit of a statutory presumption of having made an election in writing before the Workmen's Compensation Board to secure occupational disease coverage. (Opinion in Dick case, Appendix, pp 61, KRS 342.395).

(7) Reliford did not have the benefit of such statutory presumption, such statute not being effective until June, 1952, more than a year after the accrual of his cause of action.

(8) The collective bargaining agreement in the Dick case did not provide for notice of compliance to be posted at the mine.

(9) The collective bargaining agreement in the case at bar did provide for notice of compliance to be posted at the mine.

From this comparison of the facts in the case at bar and the Dick case, it is readily apparent that no change in applicable state law has taken place.

The opinion of the Court of Appeals clearly demonstrates this. That opinion, of course, is relied upon primarily by respondent here. Incisively reasoned and logical throughout, respondent can make no more able argument for denial of the Writ than contained in the

opinion below. The combined legal experience of counsel for respondent is less than a score of years, and we will not presume to develop further the clear, concise and sagacious distinctions made by the Court of Appeals. We would, however, make these further observations.

In both the Dick case and the case at bar, the Kentucky occupational disease law required a joint voluntary application in writing. In the Dick case, the question was posed as follows:

> "The question is presented whether there was such an election (1) by the workmen by virtue of a statutory presumption, and (2) by the employer by virtue of the legal effect of its contract with the workman's union or by estoppel to deny its election."

The Court had to find both that the employer and employee had made such a joint voluntary application. The Dick case arose subsequent to the effective date of KRS 342.395, as amended. (Ap. pp. 25-26). The Dick case turned, in part, upon the conclusion of the Court of Appeals of Kentucky that by virtue of such statutory presumption, he had made a voluntary application.

Both parts of the question posed by the Kentucky Court of Appeals in the Dick case had to be answered in the affirmative in order to arrive at that decision.

In view of the statutes in effect at the time Reliford's claim arose, it would have been impossible for the Court to have answered the first part of the question

in the affirmative because Reliford would not have had the benefit of the statutory presumption of acceptance.

Assuming arguendo, that the Court had found petitioner estopped to deny its election, such unilateral action on its part would not have vested the Board with jurisdiction.

> "The Court of Appeals of Kentucky under this provision holds that **if either the employer or employee does not manifest his election in accordance with the terms of the statute they are not applicable**, even though both intended to operate and believed they were covered. McNeese Construction Company v. Harris, 273 SW 2d 355." (Emphasis added) (Majority Opinion, Court of Appeals, Ap. pp 36).

The Court of Appeals of Kentucky held in the Dick case that by virtue of the statutory presumption, Dick had elected, and by virtue of the contractual obligation imposed upon the International Harvester Company, the company was estopped to deny its election and the applicability of the occupational disease provisions of the Workmen's Compensation Act of Kentucky. It did not hold, nor purport to hold, that Dick would have been estopped had he instituted an action against the company for its breach of its contractural obligation to him.

By virtue of the contract between the company and Dick, and by virtue of the statutory presumption, Dick had an election of remedies. It was held that he could proceed as he did. It did not hold that he could not

have proceeded on the contract. As stated by the majority opinion on the petition for rehearing below, in the instant case, the miners were not "compelled to exhaust the remedy under the Workmen's Compensation Act before filing suit, . . .". The Court further said: "We are cited to no case that holds that when a plaintiff has two alternative remedies he has to exhaust the remedy he does not choose to adopt before choosing to adopt the other." (Ap. 53). The majority opinion also stated that it believed such a proposition unsound in principle.

Petitioner argues that, under the decision in the Dick case, it had elected to be bound by the occupational disease laws of Kentucky, and that Reliford had the right to elect and since he did not, there was no breach on its part, and it is absolved of liability.

This argument is ironic to this respondent. Petitioner has obviously forgotten the facts in the case of Eastern Coal Corporation v. Morris, supra. This case was decided one month before decedent instituted the present action and was the pole star which guided decedent in choosing his course of action. In that case, Morris filed claim before the Compensation Board under statutes believed applicable. Petitioner stipulated in open hearing, before the Board, that it had elected to operate under the provisions of the Act. After its liability to Morris had been established and after its letter to the Board of date March 1, 1952, petitioner sought to show that it had not, in fact, elected to operate under the Act to provide silicosis coverage. On refusal of the Board to permit it to do this, it prosecuted an appeal to the Court of Appeals of Ken-

tucky, challenging the award of the Board which had been based on the ground that petitioner was estopped to question the fact of its election and the resulting applicability of the Act to it. The Court held that despite such stipulation, petitioner was not estopped to question its election, was not amenable to the Act and reversed the award of the Board.

By the decision in the Morris case, this petitioner was permitted to escape liability to another of its faithful employees who had contracted the dreaded disease of silicosis on the ground that petitioner was not estopped to deny the applicability of the Workmen's Compensation Act to it in spite of its stipulation and letter of March 1, 1952. To permit petitioner in this case to escape liability to this respondent on the ground that respondent is estopped from maintaining this action because her decedent did not follow the ill fated course pursued by Morris, would create a legal paradox without parallel in the annals of the law.

THE DECISIONS OF THE COURT OF APPEALS AS TO PROCEDURAL AND SUBSTANTIVE QUESTIONS DO NOT CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner alludes to a claimed conflict between the decision of the Court of Appeals in the case at bar and decisions of this Court with regard to procedural and

substantive law. Basically, such claimed conflict arises only if the Kentucky law has been changed.

We submit, for reasons above stated, that there has been no such change, and consequently no such conflict exists.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAN JACK COMBS
Pikeville, Kentucky
Attorney for Respondent

FRANCIS DALE BURKE
Pikeville, Kentucky
Of Counsel for Respondent